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CHATTEL MORTGAGE EXECUTED IN MISSOURI AS AN IOWA CONTRACT ON PROPERTY IN BOTH STATES, BUT TO BE REMOVED TO THE LATTER STATE.

In Dickson et ux. v. Cooper, 164 N. W. 734, decided by Iowa Supreme Court, it appears that plaintiffs clandestinely left Iowa and "went to Andrew County, Mo., probably to reside." They took with them a small part of personal property of the husband's goods and chattels. Defendant sued out attachment in Missouri and the personal property he took with him was seized under the writ. He gave a mortgage in Missouri over all his personal property in both states and dated it in Iowa, and made it payable at a bank there. Defendant and the husband stipulated for his return to Iowa and the mortgage was recorded in a county in Iowa to which he returned and resided.

When defendant sought foreclosure in Iowa, the wife claimed exemption and this claim was allowed by the trial court. This ruling the Supreme Court reversed, one judge dissenting. Appellee contended that "the contracts were to be performed in Iowa, were executed in contemplation of the immediate return of the plaintiff and the property in question to the state of Iowa, and that, therefore, the contract is, in its inception, an Iowa contract, and must be construed according to the laws of this state, and that as a mortgage upon exempt property is not valid in Iowa unless signed by the wife, the mortgage, insofar as the property in controversy in question is concerned, is void, as it is conceded that the same would be exempt to plaintiff from sale under a general execution. Appellant contends that at the time of the execution of the contract, plaintiffs were resident of Missouri, and that, under the laws of that state it was not necessary to the validity of the mortgage that same be signed by the wife, even though covering property exempt in that state from execution."

The majority thought that the mortgage was valid as of the time it was executed in Missouri, where it was executed.

The dissenting judge said: "I am of opinion that the mortgage should, under the record, be held to be an Iowa contract. True, it was signed in Missouri and Dickson had absconded, but some of the property covered by the mortgage had not been taken from Iowa; some of it was in Missouri, but held by the sheriff under attachment until it was returned to Iowa. * * * I think it was contemplated that the mortgage should not be effective until the things enumerated should be done as they were. The contract must be enforced here if at all. Dickson himself may not be entitled to much consideration, but the exemption laws are for the benefit of the family, and should be liberally construed in favor of the debtor."

This case presents a question in conflict of law quite interesting. While, if the mortgage is invalid if not an Iowa contract, there would seem to be no consideration for mortgagee agreeing to call it an Iowa contract. He got nothing whatever for his release of the attachment in Missouri. But, if possession is necessary to sustain the mortgage against a fraudulent transfer or against the presumption of fraud, it would seem to mean, that its signing in Missouri was merely anticipatory of what personal property he carried from Iowa and that he left there afterward coming into his actual possession in Iowa. Whatever might be thought of mortgagor having actual possession of any of the property in Missouri, he certainly did not there have possession of what remained in Iowa. But the mortgage was to be *eo instanti* as to the property in both states. That must have been when he returned to Iowa.

If the mortgage was executed before a Missouri officer that would have little effect. Here the question was between mortgagor

and original holder, but even had this been between mortgagor and a subsequent holder, the recitals of residence would bind him.

Why is not the plain recital of residence binding on the parties? If the contract *qua* contract is a Missouri contract, yet the enforcement provisions thereof contemplate plainly submission to the laws of another state. Suppose mortgagor, in violation of his stipulation, had carried the property to another state than that of Iowa, could it have been followed under the mortgage? We think not. And had he have remained in Missouri, could it have been used as a mortgage of that state, despite the fact of its falsity as to actual possession of some of the property? It seems it could not, because it contemplated that before it could take effect as to any of the property, all of it should first become Iowa property.

It seems to us, that if one gives a mortgage by virtue of a contract made in one state, that is to have enforceable potency in another, this is a lawful agreement, and that it invokes the application of the statute law of another. Chattel mortgages are governed by local law.

NOTES OF IMPORTANT DECISIONS.

STATUTORY CONSTRUCTION — REPUGNANCY BETWEEN EARLIER AND LATER STATUTE.—The rule may be thought fairly well established, that repeals by implication are not favored and courts will endeavor to reconcile an earlier and a later statute if it is fairly possible so to do. But this rule is more of a common sense, than a technical, rule and construction will not be strained to sustain both statutes, but the surroundings and the purpose of the later enactment will be inquired into. The question of implied repeal lately came before Missouri Supreme Court, Division No. 2, in the case of Nichols v. Hobbs, 197 S. W. 258.

It appears that in 1855 a statute was passed for the recording of conveyances affecting real estate, provided they are acknowledged and proved in a certain way. This way of acknowledging and proving, it may be said, did not apply to wills and to make it certain that wills were not embraced, a section of the act specifically so provided. Such instruments as were embraced were when recorded to carry constructive notice.

Fifteen years later, that is to say, in 1870, an act was passed for the recording of wills in counties where land devised is situated, but nothing is stated as to the effect of such recording as or not carrying constructive notice. This act appears in Missouri Revised Statutes as § 566. It is mandatory on its face as to recording and fixes six months after probate as covering period for compliance.

The case shows that there was an attempt at compliance, but an important clause was omitted. Land was devised by the will to E. A., "and to the heirs of her body," but in the recording the words italicized were omitted altogether. E. A. and her husband conveyed the land, and after her death in 1912, her grandchildren sued to recover the land. It does not appear when the land was conveyed to defendants, but testator died in 1875. Plaintiffs had judgment, according to the true record of the will in the probate court, and defendants claimed under the will as recorded in the office of the recorder of deeds, the same office in which deeds having constructive notice were to be recorded. In this case defendants relied on 10 and 30 year statutes of limitations. It is apparent, however, this could not be urged if right of action did not accrue until death of plaintiffs' ancestor.

The court after urging lack of necessary inconsistency between these two statutes, says: "If the purpose of enacting § 566 (the later statute) had been to place wills, when recorded in the recorder's office, in the same condition and subject to the same provisions as instruments mentioned in (the earlier statute) and repeal § 2823, such intention would have been manifest in the terms of the act. The legislative intention and the legislative understanding evidently always has been that both sections shall stand together, because both have been carried along from revision to revision, from 1870 down to date."

We are not greatly impressed with the weight of the fact of a mere carrying on as stated. Revision or codification is, according to a rule of erring, if any way, along the side of preserving in codes whatever may be law. It takes no chance in excluding anything.

But what could have been the intention to have an additional record in the recorder's office, when a record is preserved in the probate court? In the former office a record, of a conveyance duly acknowledged and proved,

is constructive notice. It is only when a conveyance gets on record not duly acknowledged or proved that this notice does not result. Why add another qualification to the statute?

It may be said that express terms in § 1023 cut no figure. That is purely negative and in the way of construing the act of which it is a part. There is no doubt, that, if the legislature intended that the ordinary rule of conveyances properly recorded in the recorder's office, should apply to wills, it does amend the former act.

LARCENY—ABSTRACTING WATER OF PUBLIC SERVICE CORPORATION BY TRICK.—In Clark v. State, 167 Pac. 1156, decided by Oklahoma Criminal Court of Appeals, it is held that one who takes water from a public service water company by diverting same through a pipe passing around a water meter, so that it cannot be registered and appropriating same to his own uses, is guilty of larceny.

The court refers to rulings at common law, to the effect that water is of the nature of birds and animals, ferae naturae, and as to which there can be no larceny, except it be taken from one lawfully reducing the same to private possession.

1 Wiel on Water Rights, § 31, says, in quoting from Pothier, that: "This is why, in the case on returning from the river, I have for some purpose, left my pitcher standing on the road, with the intention of returning later to fetch it where I left it; if in the meantime a passerby, having found my pitcher, proceeds (to save himself the trouble of going to the river) to pour into his pitcher the water that was in mine, he has committed against me an actual theft of that water, which water was a thing of which I was actually proprietor."

But is water taken into a reservoir or in the pipes of a public service company, taken there by a captor, or is it merely held in place as still belonging to the public? It has permission or right only to deliver what is public property by means the public approves. It never comes into legal possession of the water to do with it as it pleases. And when it delivers it to users it does not charge for the water as water, but for the use to which it puts its facilities in delivering. It delivers nothing to which it has title. Water in its reservoir cannot be wasted, but must be devoted to beneficial purposes, or the company unlawfully diverts it.

The court in answer to the contention that the company has only the right to charge for service and not for water, says: "That water confined in the company's mains is personal property, capable of ownership, cannot be disputed. The courts have so held practically without dissent," but it cites no case one way or the other. It seems to us that this is not capture by a private person, but it is only preparation for segregation from the public supply. It not yet has been actually segregated. The public trust is still in the water. If it cannot be delivered for a beneficial purpose, it ought to be returned from whence it was taken. But may it not be that the company, as bailee of the water, has a special interest therein which would sustain larceny from it as owner? This only applies, however, to ordinary bailments between individuals.

LIBEL AND SLANDER—QUALIFIED PRIVILEGE AS BASED ON PUBLIC INTEREST OR DUTY TO ANOTHER.—There seems much elasticity in the phrase, duty to another, in a ruling by Supreme Court of Washington, as creating qualified privilege rendering a libel or slander privileged and preventing liability for its publication or utterance, except maliciously. Fahey v. Shafer, 167 Pac. 1118.

It appears that plaintiff conducted an upstairs clothing business and advertised in the newspapers that: "other merchants in the city occupied expensive ground floor rooms, with luxurious and extravagant fixtures, involving large rentals, and that plaintiffs were thus able to undersell and did undersell such ground floor merchants, who were imposing on the public by charging in the cost of their goods their extravagant rents, so that plaintiffs were able to sell and were selling $25 suits for $15." Defendants were charged with inducing the newspaper receiving plaintiffs' advertisements to refuse to take them further.

Defendants, it seems, belonged to an ad club which was greatly agitated on the subject of the upstairs dealers' advertisement. Defendants slammed on the table in a meeting and asserted in effect that their business could not succeed and sooner or later there would be a crash.

The court as to privilege said: "That defendants had a personal interest in the subject-matter of the communications there can be no question. Appellants' advertisements were a direct attack upon them and their business methods. They were charged with business extravagance, exorbitant prices and advertising fake sales." All of defendants being members of the ad club, it was held that defendants owed a duty to other members and this made their communications privileged.

Why this membership relation can build a duty by one to the other to the extent, that

so far as one member does not act maliciously in publishing a libel or uttering a slander against another, it is difficult to spell out. It is purely conventional that they thus associate. The party whom they may libel or slander has nothing to do with that relation. If this principle were true, combination for an ulterior purpose, though lawful, in itself, hedges an outsider's rights. If one says something to a man's agent, or about his family, the case may be different. But you cannot import a mere conventional relation into a duty to protect all of another's associates therein, and thus disarrange or seriously impair a third person's otherwise clear protection against injury by libel or slander, or interrupt the performance of one's legitimate contracts with another.

EXEMPTION FROM MILITARY SERVICE UNDER BRITISH LAW.

In characteristic British fashion it was only after a year and a half of war that Conscription was introduced at all and when resolved on it was introduced only gradually, three successive Acts being passed at intervals of about six months for the purpose of bringing in the various classes of men whom the state desired to enrol as soldiers. From these statutes certain well defined exceptions were made and these having now all had occasion to be considered by the Courts, we propose to give here a brief account of the result of these decisions in the hope that they may be of service in similar problems which may perchance arise under the American Conscription Law.

The Military Service Acts expressly apply to British subjects. Under the British nationality and Status of Aliens Act, 1914, however, any person who is, by birth, a British subject, but by foreign law still a foreign subject can, on attaining twenty-one, elect to adopt the foreign nationality. In the case of *ex parte* Freiberger, the man in question had attained twenty-one in January, 1917, and made a declaration choosing Austrian nationality. Prior to that, however, he had been called to the Colors and in a series of appeals contended that he was outside the statutes. The Court of Appeal found that as he was a British subject when called up, he was in law a reservist and his subsequent acquisition of alien nationality could not operate a discharge from the army. But, the Court went much further than this and laid down the principle that a British-born subject of alien parentage cannot make a declaration of alienage at all; in time of war. To do so would be to commit an act of treason and therefore, an illegal act not recognizable by law.

The Statutes are declared not to be applicable to men in Holy Orders or regular ministers of any religious denomination. In Kipps v. Lane,[1] the man in question was an "elder" of a Church of the International Bible Students' Association, elected to the office annually, but receiving no pay as an "elder" and earning his living as an employe in a firm of drapers and outfitters. He was held not to come within the exception. Similar cases with regard to the same religious body have also been decided, and in all of them their "elders" were held to be not regular ministers.

On the same exception a most interesting case was discussed by the Court of Appeal in re a Mormon elder Hawkes v. Moxey.[2] In the Inferior Court, the Justices had taken the view that the Latter Day Saints are not a religious denomination, their principal ground for so holding having been that the Mormon Church did not appear in the Army Councils List of

(1) 33 T. L. R. 207.
(2) 33 T. L. R. 308.

recognized religious denominations, also that they were a small body, having only 50,000 adherents, and were moreover alien to Great Britain and practiced polygamy. On appeal, these findings were overruled. It was pointed out that the Army Councils List of denominations was not conclusive; that as a body the Mormon Church was not so small as to be incapable of being regarded as a religious denomination; that though an alien to Great Britain, the same might be said of the Roman Catholic, the Greek or the Lutheran Churches, and that as regards polygamy the fact appeared to be that that practice had been abolished by the Mormons a generation ago. The conviction against the appellant was accordingly quashed and the case was sent back to the Justices to be reheard on the simple point, whether or not he was a regular minister of the Mormon Church and so entitled to exemption. On the other hand in Kick v. Donn,[3] a body of fifty or sixty persons called the Undenominational Church and known only in one village, was considered to be so small as to justify the conclusion that they were not a religious denomination within the meaning of the Act.

Another exception from the Statute is members for the time being of His Majesty's Forces. In Fraser v. Military Authorities,[4] the appellant joined the army in 1914, and after attaining the rank of captain, was gazetted out in November, 1916. He was afterwards called up under the Military Service Act, but contended that as he was an officer of the regular forces at the time of the passing of the Act, he came within the exceptions contained in it, which exceptions include members of His Majesty's Forces and that he was not liable to perform military service. The Justices made an order handing him over to the military authorities, and on appeal, it was held that his case turned on the words whether he was "for the time being" within the exceptions and that the words "for the time being" referred not to the date of the passing of the Act but to the date when the appellant came within its operation by ceasing to be a member of the regular forces and therefore the Justice's Order must be affirmed.

The present age limit for Military Service is forty-one and with regard to the exception of those who have attained that age, from the Act reference may be made to the case of Ridout v. Cope.[5] Under the scheme of the Military Service Acts on the appointed day, "a man is deemed to be enlisted and transferred to the Reserve," but he need not be called up till a later date. If he gets temporary exemption, he cannot be called up until his exemption expires. It happens not infrequently that a man is not forty-one on the appointed date, but reaches forty-one before he is called up or before his certificate of exemption expires. Is such a man liable to serve or not? The decision in the case referred to was that he is liable to serve. His liability commenced on the appointed date, when he was under forty-one and is only suspended —not terminated—during the currency of a certificate of exemption.

One of the difficult points in interpreting the Statutes consists in deciding what does not amount to ordinary residence in Great Britain, that being a condition precedent to liability for service. Nevertheless, a person ordinarily resident in Great Britain may be excepted from the Act if he is at the same time ordinarily resident in His Majesty's Dominions abroad, or resident in Great Britain only for some special purpose. An obvious question is how a person can be ordinarily resident at the same time both in Great Britain and abroad and

(3) 33 T. L. R. 225.
(4) 142 Law Times 446.
(5) 33 T. L. R. 452.

in Pittar v. Richardson, the King's Bench Division, on appeal, laid down that it was not impossible for a man to be ordinarily resident both within and without Great Britain at the same time, in which case such a man would be excepted from liability to military service. In the case referred to, the decision of the Justices in the Court below was not disturbed, it being a decision on a question of fact to the effect that the appellant was ordinarily resident in England.

The latest decision on the Statute is with regard to the exception excluding any prisoner of war captured or interned by the enemy who has been released or exchanged. The theory of this exception was to enable the authorities to make arrangements with the enemy for exchange of prisoners on the footing that these would not, in future, take part in warfare. In Robinson v. Metcalfe,[6] a question under this exception came before the Divisional Court. The appellant, while returning from Germany, just after the outbreak of war, was detained for some hours in Germany, but was released and allowed to proceed. He claimed that his detention, while it lasted, made him a prisoner of war and therefore exempt. His argument turned on the contention that the words "prisoner of war, captured or interned by the enemy," must be read disjunctively, i. e., prisoner of war, or captured, or interned and not read as a whole. This construction did not commend itself to the Court and they held that the appellant must show that in addition to being technically a prisoner of war, he had been captured or interned by the enemy and that a few hours detention did not satisfy this condition.

DONALD MACKAY.

Glasgow, Scotland.

(6) See Times, 27th July, 1917.

HAND BRAKES ON INTERSTATE TRAINS AS A PRECAUTIONARY MEASURE, OR IN CASES OF EMERGENCY.

Recently in the preparation of a case in the United States District Court, it became necessary to consider to what extent, if at all, hand brakes might be used on interstate trains, as a matter of precaution, or to meet possible emergencies.

The facts bearing on the question were, briefly: The train in question, containing twenty-eight cars loaded with coal and coke, was being operated in a mountainous section of very steep and long grades. Going up the mountain, the custom was to use a helper engine. Going down, the grade being steep and very long, the custom was for the brakeman to set hand brakes upon a number of the cars, as a precaution against loss of control in case of accident to the power or air brakes by which the train was primarily held in check. This train was equipped with air or power driving wheel brakes, as required by the Safety Appliance Act and orders thereunder. Indeed, more than the required eighty-five per cent of the cars were so equipped. Barring accidents the power brakes were sufficient to control the train upon the grade in question.

A brakeman while setting hand brakes, as the train started down this grade, lost his balance, fell between the cars and was killed. Suit was brought under the Federal Employers' Liability Act and Safety Appliance Acts by his administrator. There was no negligence, unless the requirement that hand brakes be set as a matter of precaution, was such. At the last moment the case went off without trial on the merits; but during its investigation I was impressed with the doubt surrounding the question upon the authorities.

The Statutes—The Act of Congress of March 2, 1893, Sec. 1, as amended by the

Act of April 1, 1896[1] provides for the equipment of all trains in interstate commerce with power driving wheel or train brakes, and makes it unlawful to operate such train unless it has sufficient cars so equipped that the engine can control its speed without requiring brakemen to use the common hand brakes for that purpose.

The Act of March 2, 1903, Sec. 2[2] requires not less than fifty per cent of the cars in such train to have their brakes used and operated by the engineer, and gives the Interstate Commerce Commission power to increase said minimum percentage upon hearing.

The Act of April 14, 1910, Sec. 2[3] expressly enacts that all cars shall be equipped with efficient hand brakes and makes penal the hauling or use of any car not so equipped.

Pursuant to the power vested in the Interstate Commerce Commission by Sec. 2 of the Act of March 2, 1903, above referred to, said Commission, by order of June 6, 1910, provided that on and after September 1 of that year all trains used in interstate commerce shall have the brakes of not less than eighty-five per cent of the cars composing them used and operated by the engineer of the locomotive drawing same.

The Decisions—These provisions came before the United States District Court of the Western District of Pennsylvania in the case of United States v. B. & O. R. Co.[4] It was held that the statutes did not prohibit the use of hand brakes upon grades in connection with the power brakes.

It was held that it must be shown that the hand brakes were used to control the speed of the train, and that the burden was upon the plaintiff. That the evidence introduced tended to show that the hand brakes used on the Sand Patch grade were not used for the purpose of controlling the speed of the train, and that the Safety Appliance Act of 1893 and its amendments did not prohibit the use of the hand brakes was clear.

The orders to trainmen, introduced in the case, disclose that the application of hand brakes was required to insure the safe movement of the trains and so as to enable the engineers to control their speed without exhausting the power of the air brakes.

This case was affirmed by the Circuit Court of Appeals of the Third Circuit for want of satisfactory showing that the court below committed error; but without expressing an opinion as to the construction placed by the lower court upon the Safety Appliance Statutes.[5]

The next case considering the use of hand brakes upon interstate trains in transit is the Virginian Railway Co. v. United States, decided by the Circuit Court of Appeals of the Fourth Circuit, May 4, 1915.[6]

The facts in that case were that the Virginian Railway was constructed primarily for transporting coal from the mining districts of West Virginia to tide water. Great care had been taken to secure low grades, and it was practicable to operate trains of one hundred cars each carrying approximately fifty-four tons. Because of the unstable condition of the road bed, trains were limited to speed of five and ten miles an hour. And it was found that such long trains could not operate safely at this low rate when air brakes alone were used for their control. To avoid jerking and breaking of the train, the railway company decided upon the use of hand brakes, and by order, trains were controlled by the hand brakes; the engine brake being used only in emergency.

Action was brought by the United States to recover penalties for violation of the

(1) 27 Stat at L. 531; 29 Stat. at L. 85.
(2) 32 Stat. at L. 943.
(3) 36 Stat. at L. 298.
(4) 176 Fed. 114.
(5) 107 C. C. A. 586; 185 Fed. 486.
(6) 139 C. C. A. 278; 223 Fed. 748.

Safety Appliance Act, and it was held that such use of the hand brakes to control trains in the ordinary line movement was unlawful.

It will be noted that the precise question determined is that it is unlawful to control interstate trains in ordinary line movement by the hand brakes alone. Nothing is said of the right to use such hand brakes as a matter of precaution or in emergency. Certain expressions of the court would seem to prohibit the use of hand brakes upon such trains in transit for any purpose. Thus, it is said that it is a necessary implication, from the language of the Safety Appliance Act, that the use of hand brakes is prohibited, and that the evident purpose of the train brake provision is to prevent the danger resulting from the operation of hand brakes on the tops of cars in moving trains; and that its object is to keep employes from going on top of the cars to set and release the hand brakes.

The court denied the argument of the railway company that since the statute required cars to be equipped with hand brakes, and did not expressly forbid their use for controlling the speed of trains, it was left to the discretion of those operating the trains as to when and under what circumstances the power brakes and the hand brakes respectively should be used.

But in that case the question throughout is the right to control the train by hand brakes; and it is expressly said by the court that conditions proven disclose no emergency or extraordinary difficulty; that defendant, simply for the sake of convenience or economy, deliberately ordered the use of hand brakes in the daily and customary operation of its trains; that the operating conditions which occasioned the need of handbrakes were of defendant's own creation in the length and weight of its trains, and the speed at which same were operated.

The matter was next considered in the case of United States v. The Great Northern Railway Co., decided by the Circuit Court of Appeals of the Ninth Circuit, February 14, 1916.[7] This, also, was an action to recover penalties. Demurrer to the complaint that the counts thereof did not set forth facts sufficient to constitute an offense against the United States was sustained. From this judgment the case went to the Circuit Court of Appeals. It was alleged that the defendant operated freight trains, the speed of which was at times controlled by brakemen, who were required to use common hand brakes for that purpose. It was stipulated that the engines were equipped with power driving wheel brakes and appliances for operating a train brake system, and that in each train not less than eighty-five per cent of the cars were equipped with power or train brakes, which were used by the engineer drawing such train, to control its speed in connection with hand brakes.

The majority of the court reversed the lower court, holding that it was the intention of Congress to make it unlawful to require brakemen to use hand brakes in the ordinary management and movements of freight trains in interstate commerce; and that it was the purpose of the Act that brakemen should not be required to use the tops of the cars for braking, nor to walk on the running-boards of moving trains.

But it will be noted that throughout the majority opinion, the court is careful to confine its holding that hand brakes shall not be used to the ordinary moving of freight trains in interstate commerce. The court refuses to follow United States v. B. & O. R. Co.,[8] and the decision in the case of the Virginian Railway Company is expressly approved.

But the authority of this case is weakened by the vigorous dissent of Judge Ross, who points out the limits imposed upon the doctrine of the Virginian Railway case by

(7) 144 C. C. A. 209; 229 Fed. 927.
(8) Supra.

its facts, and holds that there is nothing in the statute which either expressly or by implication prohibits the use of hand brakes in connection with the power brake system.

But in neither this nor the Virginian case is the precise question whether hand brakes may be used, as a matter of precaution against accidents under unusual conditions, such as mountain grades, upon interstate trains in transit, considered.

The Virginian Railway Company case does not refer to the case of United States v. B. & O. R. Co., above referred to. But in the Great Northern Railway case, the two cases are treated as being opposed in principle. The question under consideration is more directly treated in the B. & O. case cited than in either of the other cases. But the failure of the Circuit Court of Appeals in that case to express an opinion upon the construction given the Safety Appliance statutes by the lower court greatly weakens its authority.

In mountainous sections grades are necessarily sometimes steep and long. Operation of trains on such grades is unavoidably attended by special hazards. Train or air brakes, like other human inventions, are subject to accident, risk of which is particularly great in the strain of long and heavy application. It would seem, in reason, that where the power brakes are normally sufficient, and up to the standard required by the acts of Congress, and orders of the Interstate Commerce Commission thereunder, that hand brakes may be used in good faith, not primarily for the control of the train, but to prevent disaster in case of accident to the power brakes; and that the railway company would not be liable for accident to brakemen while setting the same, without fault on its part.

The statute requiring all cars to be equipped with hand brakes manifestly contemplated their use. It would seem that a proper case is presented for such use when risk to the entire train and crew from reliance alone on the power brakes is great. In such case, the danger to the whole train and crew should take precedence of the risk to the individual brakeman.

The Virginia Railway case has been taken to the Supreme Court. Possibly the Great Northern Railway case also. Opinions defining the extent to which hand brakes may be used on interstate trains may be expected.

In view of the conflict in the cases above pointed out, and the direct conflict in the holdings of the various courts of appeals as to the application of the statute in switching movements,[9] the whole subject is much in need of clarification.

J. A. SUSONG.

Greeneville, Tenn.

(9) United States v. Erie R. Co., 129 C. C. A. 307; 212 Fed. 853; 3rd Circuit; and United States v. C. & O. Ry. Co., 130 C. C. A. 262; 213 Fed. 748, 4th Circuit.

BURGLARY—POSSESSION OF STOLEN PROPERTY.

COMMONWEALTH v. COYNE et al.

Supreme Judicial Court of Massachusetts. Worcester. Oct. 20, 1917.

117 N. E. 337.

The evidence tending to show guilt in a prosecution for the breaking and entering of and larceny in a certain residence, evidence that defendants when arrested had in their possession diamonds and other jewelry of the value of $2,200 was not subject to the objection that it was not admissible unless it could be shown that the articles could be identified as property stolen from the residence; as the possession was a circumstance proper for the consideration of the jury as tending to show property in the hands of defendants subsequent to the alleged larceny.

RUGGS, C. J. **The defendants were indicted jointly for breaking and entering the dwelling house of one Wallace in the night time, with the intent to commit larceny, and the larceny therein of divers articles of jewelry and precious stones of an aggregate value of**

about $5,000. There was evidence tending to show that the defendants committed the crime.

After the defendants had introduced some evidence the court, at the request of the district attorney, permitted him to reopen the case and introduce further evidence in support of the charge in the indictment. The conduct of the trial and the order of the introduction of evidence ordinarily is within the discretion of the trial judge. There is nothing to indicate an abuse of such discretion.

The evidence thus introduced out of order was to the effect:

That when arrested, the defendant Coyne had in his possession $350 in money; "one New York, New Haven & Hartford Railroad Company 500-mile ticket, containing 156 miles, stamped, 'Bridgeport, Conn., Oct. 20, 1916;' one platinum ring set with three diamonds, stated by the defendant to be worth $1,000, but he declined to tell where he got it; one diamond stick pin set in platinum, stated by the defendant to be worth $500; one gold-handled knife attached to a 14-inch gold and platinum link chain, stated by him to be worth together $45; one gold stud button set with a diamond, stated by him to be worth $20; one gold collar button, stated by him to be worth $10; one small gold stick pin set with a diamond, stated by him to be worth $20; one gold locket set with a diamond, attached to a gold chain, both stated by him to be worth $20; one pearl-handled knife, stated by him to be worth $4; one open-faced gold Elgin watch with the monogram 'T. P. C.' on the case, stated by him to be worth $40; one pair gold cuff links, stated by him to be worth $20; one black leather traveling bag containing various articles of clothing; * * * and that the defendant Farrell had in his possession money amounting to $117; one New York, New Haven & Hartford Railroad Company 500-mile ticket, containing three miles, stamped, 'Stamford, Conn., Oct. 9, 1916;' one Elgin gold watch, stated by the defendant Farrell to be worth $28; one gold ring set with a diamond, stated by him to be worth $425; one platinum watch chain, 14 inches long, stated by him to be worth $50; one crown stick pin set with diamonds and sapphire, stated by him to be worth $65; one pair pearl cuff links with diamond, stated by him to be worth $15; one gold stud with diamond, stated by him to be worth $20; one gold-handled knife set with two small diamonds, with the initials 'M. F.' engraved on handle, stated by him to be worth $10; and one black leather traveling bag containing the pair of shoes, clothing and other articles. It was admitted by the commonwealth that none of the specific articles taken from the Wallace residence were found in the possession of the defendants, or anyone else connected with the defendants."

The defendants objected to this evidence unless it could be shown:

That these articles "had some connection with or relation to, the breaking and entering of and larceny in the Wallace residence, or could be identified as property stolen from the Wallace residence."

No other ground of objection appears then to have been suggested. It is manifest that this ground of objection is not sound. The possession of property of considerable value, whether jewels or money, although not identified as a part of the property stolen, is nevertheless a circumstance proper for the consideration of the jury as tending to show property in the hands of the defendants subsequent to the alleged larceny. Such evidence is competent in the case at bar. Its weight may be trivial or cogent according to other conditions shown. It might be slight against a person of affluence and of extravagant habits. It might be of importance against one of small estate or of no visible means of support. There was evidence tending to show that neither of the defendants had worked for a year, and that when arrested they declined to tell where they were on the date of the crime alleged. As to Coyne, it appeared that when arrested he said, in substance, that once he had been an inmate of Concord reformatory and was an engraver by occupation; that a witness called by him testified that he had known Coyne for many years, that he did not know what his business was, and that he knew he had worked in a rope factory about eight years before, and had been employed in a bakery three or four years before for a few weeks. As to Farrell, it appeared that his sister testified that he had made his home with her for some years, that she saw him at her house every two or three weeks, that she never inquired as to his business and did not know what it was or whether he had any, that she understood he was a traveling salesman, and that she knew he had traveled for a varnish house. This state of evidence does not indicate commonly such a state of financial resourcefulness as accompanies the ownership of the kind and amount of jewelry and diamonds found in the possession of these defendants. The ordinary law-abiding man, whether artisan or of other occupation, who has not worked for a year and whose friends or family do not know his business, does not commonly carry about with him for personal use and adornment diamonds and other jewelry of $1,600 value, as did one of these defendants, or even of $600 value, as did the other defendant. Of course this evidence standing alone does not prove criminal conduct. But there were strong accompanying circumstances of guilt of an independent character. As was said by Mr. Justice Holmes in Commonwealth v. Mulrey, 170 Mass. 103, at pages 110, 111, 49 N. E. 91, at page 94:

"It is not necessary that every piece of evidence admitted should be sufficient by itself to prove the crime. Evidence which may be colorless if it stood alone may get a new complexion from other facts which are proved, and in turn may corroborate the conclusion which would be drawn from the other facts. * * * It is possible that" these defendants "may have had an independent fortune from which" these jewels were purchased, "but that was open to" them to prove if they "saw fit and was not the probability with regard" to persons in their general situation.

Upon the authority of that decision and of Commonwealth v. Montgomery, 11 Metc. 534, 45 Am. Dec. 227, this evidence was admissible. If there is anything inconsistent with this conclusion in Williams v. United States, 168 U. S. 382, 396, 18 Sup. Ct. 92, 42 L. Ed. 509, it is equally inconsistent with our law as declared in the authorities just cited. Indeed, the soundness of the federal decision has been doubted. See 1 Wigmore on Evidence, § 154, p. 213.

The evidence was not too remote in time. It can hardly be said as matter of law that an interval of about two months had broken the reasonable probability of connection between the amount of booty secured by the burglary charged in the indictment and the possession of the jewels found upon the defendants at the time of their arrest.

It was not equivalent to the admission of evidence of another crime. That was not the ground on which it was received. The jury were not permitted to consider it in that connection. But the jury were instructed carefully to disregard this evidence upon the question of breaking and entering and to consider it only if the breaking and entering was found to be proven by independent evidence, and even then only if it was found that the defendants—

"had no other source of income to account for the possession of the property found in their possession, and if they also found that the money and jewelry were the proceeds, or a part of the proceeds, of the property stolen from the Wallace residence, they might consider this evidence in so far as this property accounts for the defendants not having the specific articles stolen in their possession when arrested; that otherwise they were to disregard the evidence entirely."

No exception was taken to the charge. But the defendants have no just ground for complaint in the particulars which have been argued.

Exceptions overruled.

NOTE.—*Possession by Accused of Other Property Than That Stolen as Evidence.*—There is no inquiry here into the question of the competency of proof of possession by accused, of property stolen in a recent burglary or larceny. This possession unexplained, it is generally held is sufficient of itself to justify conviction, at least if the burglary or larceny is recent. But when it is sought to go beyond this and introduce evidence of other property in possession of accused, the question is different.

In McAnally v. State, Tex. Cr. R., 73 S. W. 404, it was said as to evidence showing possession of other stolen property than was lost in a burglary which was being prosecuted, that this possession "does not tend to prove the offense on trial, for appellant may be innocent of one and guilty of the other. He may be guilty of the one on trial and innocent of the previous burglary. When such extraneous crimes do not go to show intent, part of the *res gestae*, or serve to identify the defendant with the crime on trial in some way, they should be rejected and not admitted. If defendant burglarized the house on trial, it is a distinct substantive crime." Admitting that the rule is substantially as stated, there yet is left wide room to show admissibility.

In Neubrandt v. State, 53 Wis. 89, 9 N. W. 824, it was held relevant as showing intent to steal that other property than that of the owner of the house was taken from the house and found in defendant's possession. The court said: "The evidence not only shows that John Bechtel was the owner of the house at the time of the commission of the crime, but it also shows that he had personal property therein which was the subject of larceny, and that a part of such property was in the same room with the stolen property belonging to his son and boarder, and was stolen and carried away at the same time the property found in the possession of the accused was stolen and carried away." This is a case where the possession of the property was indistinguishable from that of the owner of the premises. The only reason for admissibility of such evidence is to show that the burglar was present and to take away what was in the room, flagitiously, as is well shown by the taking of other property than of owner of premises and is as conclusively evidence as if his own had been taken.

In Ray v. State, 126 Ala. 9, 28 So. 634, there was testimony going to show possession of stolen property and in the statement of circumstances regarding the matter the recital disclosed possession by accused of other stolen property. A witness, for example, testified that he went to defendant's house to buy a set of harness and there he found that defendant "had two sets of harness, both of which he took out of a closet in a back room," and "offered to sell either of them, and I bought the one involved in this prosecution." There was motion to exclude the answer for its reference to the other set of harness. The court said: "Defendant's possession and the sale was the only seriously contested point in the case. It was of importance that every fact tending to show the sale from the beginning of the negotiation, including every step down to its final consummation should have been in evidence before the jury, in order for them to determine properly this pivotal question."

In People v. McGilver, 67 Cal. 55, 7 Pac. 49, evidence was introduced of the possession of burglar tools at the time claimed by an accomplice in another robbery, and that at the time of defendant's arrest he was attempting to commit

another burglary subsequently occurring. There was also evidence of possession by both defendant and accomplice of goods stolen in the crime charged. The court said: "The evidence tended to connect the parties with the burglary and for that reason was admissible."

In State v. Frank, 159 Mo. 535, 60 S. W. 1053, evidence admitted showed a gun hidden away in defendant's house two or three days after his arrest, which shortly before had been stolen from a neighbor's house, where defendant had been working. This evidence was held competent in another burglary as showing guilty intent. It was said to be competent to introduce evidence of crime recently committed so very similar to that under review where its tendency is to show that there is a series or system of criminal operations. See State v. Balch, 136 Mo. 103.

In State v. Robinson, 35 S. C. 340, 14 S. E. 766, it was held that articles stolen on other occasions were admissible in evidence where they had been secreted in the same place as those taken from the house entered, to which the prosecution related, it also being shown that there was some connection between the several offenses. The stolen property was said to be "only a part of much plunder secreted by defendant's accomplice and was inseparably connected with his transaction of crimes, in which in the light of the verdict here, every one of these appellants were parties."

The reason for the admission, as an exception to a rule, is not very fully stated in any of the cases we have found, but it would seem that a very slight reason suffices for its admissibility. That such evidence if not competent would be very prejudicial cannot well be denied. C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS' ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 137.

Mercantile Agency; Relation to Third Persons; Employment—Acceptance of employment to bring suit, from an officer of mercantile agency to whom it has been assigned for suit; not approved.—A is a domestic corporation engaged in furnishing mercantile reports to subscribing members, who pay an annual subscription fee and receive in return therefor reports containing credit information which aid them in extending credit. A also handles claims for adjustment with its subscribers only, and does not solicit collections nor receive any collections from anyone other than its subscribing members. It maintains the policy that the adjustment department is open only for the accommodation of its members.

The adjustment department of A attempts through its employes to collect accounts by personal calls and, after such calls are made, a report with the result is forwarded to A's subscribers.

In the event that it is found that the only way A's claim can be collected is by instituting a suit, then the subscriber is notified to such effect. Thereupon if suit is requested by the subscriber, A then requests the subscriber to assign his claim to X who is an employee and officer of A, for the purpose of instituting suit. The said X now desires to retain the undersigned as his attorney agreeing to pay the undersigned a stipulated amount for services, and X further agrees to advance the undersigned the necessary disbursements for suit.

The correspondence and conferences of the undersigned are to be with X only, and the undersigned has knowledge that X is connected with the A company as officer and employee as hereinbefore mentioned.

Query "A:" Is there anything unethical about the undersigned accepting such retainer from X?

Query "B": Under the aforesaid circumstances would the undersigned be in any way acting contrary to the statute with respect to corporations practicing law?

ANSWER No. 137.

In the opinion of the committee, both queries involve considerations peculiarly within the province of our sister committee on the Unlawful Practice of the Law, to which this inquirer is respectfully referred.

But whether or not the arrangement of the corporation's business described in the question constitutes the unlawful practice of the law, it should not, in the opinion of this committee, be approved, because if such practice is pursued as the regular course of business by a mercantile agency, it involves transactions between a lawyer and an officer of a corporation which would, in the opinion of this committee, be improper as between the lawyer and the corporation itself; because it tends to violate the rule that the relation between the lawyer and his client should be a direct personal relation; and because it affords a cloak for the hawking about of a lawyer's services by a corporation. (See Questions and Answers Nos. 125, 136.)

QUESTION No. 138.

Fees; Clerk—Disposition by clerk of a commission allowed to him by a title company out of its fee for searching title for his employer.—

A, an attorney, is employed by B as secretary, and paid a salary for all his time and services in whatever capacity. B makes a contract to purchase real property and A arranges with C, a title company, to search title and issue insurance. C, learning that A is an attorney at law, follows the custom of title companies by sending a check of 25 per cent of their charges to A after policy is issued and paid for by B.

Which of the following would be correct action in the premises:

1. Check endorsed over to B by A to lessen cost of title insurance to B.

2. Check retained by A personally with the knowledge and consent of B.

3. Check endorsed back to C by A, and returned with letter stating that neither A nor B could accept it.

ANSWER No. 138.

In the opinion of the committee, there is no objection to either of the courses described in 1 and 2. Without B's consent, A should not, of course, retain the check, as he should not derive a secret profit from his employer's business; but with B's consent, there is no objection to A's retaining the check. The course described in 3 should not be followed, because it is the duty of A to reduce the expenses of his employer.

(See Questions and Answers Nos. 111 and 124, and resolution of Chicago Bar Association, June 29th, 1910, published in Costigan's Cases on Legal Ethics on page 519.)

BOOKS RECEIVED.

Equity in its Relations to Common Law. A Study in Legal Development. By William W. Billson, of the Minnesota Bar. Boston. The Boston Book Company. 1917. Price, $3.50. Review will follow.

The Law and Practice in Bankruptcy, Under the National Bankruptcy Act of 1898. By Wm. Miller Collier. Fourth Edition, by William H. Hotchkiss. Eleventh Edition, with Amendments of Statutes and Rules, and all Decisions to June 1, 1917, including Amendments to Bankruptcy Act of February 5, 1903, June 15, 1906, June 25, 1910, and March 2, 1917, by Frank B. Gilbert, of the Albany Bar, Author of "Annotated (N. Y.) Code of Civil Procedure," "Commercial Paper," and Joint Editor of "Annotated Consolidated Laws of New York," etc. Albany, N. Y. Matthew Bender & Company. 1917. Price, $12.00, law Buckram. Review will follow.

HUMOR OF THE LAW.

Of all Mr. Choate's after-dinner utterances that most frequently quoted is his toast to women, delivered at one of the meetings of the New England Society:

"Woman, the better half of the Yankee world, at whose tender summons even the stern Pilgrims were ever ready to spring to arms and without whose aid they could never have achieved the historic title of the Pilgrim Fathers. The Pilgrim Mothers were more devoted martyrs than the Pilgrim Fathers, because they not only endured all the hardships the Pilgrim Fathers endured, but they had to endure the Pilgrim Fathers as well."

A New England attorney tells a story in which figures H. L. Dawes, who, it seems, in his younger days was an indifferent speaker. Shortly after his admission to the bar, he had a case which was tried before a justice of the peace in North Adams, Massachusetts, and was opposed by a lawyer whose eloquence attracted a large crowd.

The justice was perspiring in the crowded room, and evidently fast losing his temper. Finally he drew off his coat, and, in the midst of the eloquent address, burst out:

"Mr. Attorney, supposing that you take a seat and let Mr. Dawes speak. I want to thin out this crowd."

This story was told by Governor Cox at the Chamber of Commerce banquet, states the Columbus (Ohio) State Journal:

The executive requested Clerk of the House, John R. Cassidy, to prepare a bill which he wished to call to the attention of the legislature.

In time, Cassidy, who is a former probate judge of Logan County, returned to Cox's office and showed him his draft of the measure.

Jimmie scratched his head. "John," he said languidly, "I can read every word of this thing—but what in the world does it all mean, anyway? Why don't you write laws so anybody can understand 'em?"

"Well, governor, I'll tell you," said the ex-probate judge, "y' see, if laws were written so the lay mind could understand 'em, we lawyers would starve to death. That's why the alarums, excursions, preludes, whereas's, and whyso's are put in."—National Corporation Reporter.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn

1. **Acknowledgment**—Married Woman.—Deed executed by married woman to her separate land did not pass title, where it does not appear from acknowledgment that deed was explained to her, and that she willingly signed it and declared that she did not wish to retract.—Smith's Heirs v. Hirsch, Tex., 197 S. W. 754.

2. **Adverse Possession**—Claim of Title.—Where one possesses land under claim of title under a conveyance and holds it adversely for over five years, and otherwise conforms to statutes relating to adverse possession, and such property is a farm or single lot only partly inclosed, entire tract will be deemed to have been claimed and held adversely.—Crandall v. Goss, Idaho, 167 Pac. 1025.

3.——Constructive Possession.—A description in a tax deed as "four thousand acres * * * the grant originally made for A. W. C. on the Sabine river in Sabine county" is a sufficient description under Vernon's Sayles' Ann. Civ. St. 1914, art. 5676, relating to descriptions to hold constructive possession of the land included within the boundaries of said description.—Mackechney v. Temple Lumber Co., Tex., 197 S. W. 744.

4.——Statute of Limitations.—While the title to public land is in the United States no adverse possession thereof under a state statute of limitations can confer a title prevailing against the legal title under a patent from the government.—Baker v. Berg, Minn., 164 N. W. 588.

5. **Alteration of Instruments**—Materiality.—Where by mistake in drawing a note for "five hundred dollars" the word "hundred" was omitted, though the figures expressing the amount were correctly written, the holder's writing in of the omitted word was not an alteration preventing recovery on the note.—Spiering v. Spiering, Minn., 164 N. W. 583.

6. **Animals**—Game Warden.—In view of the repeal of Acts 1898, No. 108, § 3, which authorized a private person to kill dogs chasing deer, a game warden, having no greater authority in that respect by virtue of his office than a private person, has no right to kill dogs while chasing deer.—Villa v. Taylor, Vt., 101 Atl. 1009.

7. **Attorney and Client.**—Where attorney was employed to defend a suit, and his client had him file therein a counterclaim, which was sustained, the attorney had a lien upon the judgment, under Ky. St. § 107, Hatfield v. Richmond, Ky., 197 S. W. 654.

8. **Bankruptcy**—Adverse Claimant.—An adverse claimant of property also claimed by a trustee in bankruptcy has no standing to object to an order directing the trustee to sell his "right, title and interest" in the property.—In re Vanoscope Co., U. S. C. C. A., 244 Fed. 445.

9.——Adjudication.—Under Bankr. Act, § 14, subd. "a," the court is without power to discharge a bankrupt on an application filed more than 18 months after the adjudication.—In re Snell, U. S. D. C., 244 Fed. 613.

10.——Breach of Contract.—Title of cement passing with delivery to purchaser is not affected by representation in contract that it would be used in a certain building being breached by buyer's subsequent bankruptcy.—Citizens' Coal & Supply Co. v. Custard, U. S. C. C. A., 244 Fed. 425.

11.——Conditional Sale.—A trustee held not liable to a purchaser of property from a prior general assignee for sums he was compelled to pay to free certain articles from conditional sale contracts.—In re Goyette & Lavigne, U. S. D. C., 244 Fed. 638.

12.——Estoppel.—While knowledge and assent precludes a creditor from urging debtor's general assignment as act of bankruptcy, creditor's knowledge and assent of execution of instrument, which did not amount to a general assignment, will not preclude him from urging that subsequent instrument which was a general assignment amounted to act of bankruptcy.—Doty v. Mason, U. S. D. C., 244 Fed. 587.

13.——Indemnity Company.—The execution of a mortgage by one not shown to then be insolvent, to indemnify surety company which became surety on the bond of a construction company, cannot, the transaction being a future one, be treated as preferential.—Angle v. Bankers' Surety Co., U. S. C. C. A., 244 Fed. 401.

14.——Payment of Dividend.—Where none of parties within 10 days following order of referee directing trustee to make payment of dividend attempted to have it set aside, order may for that reason alone be affirmed by court of bankruptcy.—In re Stringer, U. S. D. C., Fed. 629.

15.——Right to Petition.—Where there has been presentment for payment, dishonor and notice, payee of a note may file a petition in involuntary bankruptcy against indorser, based upon his claim arising on note.—Doty v. Mason, U. S. D. C., 244 Fed. 587.

16. Surviving Partner.—On bankruptcy of partner individually and as sole surving partner of firm, claimants held, under ruling of Circuit Court of Appeals, not entitled to object to payments of dividends to other claimants out of firm funds.—In re Stringer, U. S. D. C., 244 Fed. 629.

17. **Banks and Banking** — Shareholder. — Where one, with full knowledge of the fact becomes a record shareholder in national bank, double liability imposed by Rev. St. § 5151, continues until by his act he removes his name from record.—Williams v. Vreeland, U. S. C. C. A., 244 Fed. 346.

18.——Survivorship. — Presumption, under Banking Law, § 249, that deposit in savings bank in form of joint survivorship account was intended to vest title in survivor, must yield to proof of actual agreements of parties.—In re Buchanan's Estate, N. Y., 166 N. Y. S. 947.

19. **Beneficial Associations**— Expulsion of Member.—Where plaintiffs' property rights were violated by their wrongful expulsion from defendant benefit society, courts may interfere; but wrongful expulsion, in and of itself, did not afford ground for decree of dissolution.—Steffanazzi v. Italian Mut. Ben. Soc., Vt. 101 Atl. 1010.

20. **Bills and Notes**—Fraud.—Where one assuming knowledge of facts induces director to sign a note by false statements as to corporation's business, defense to note on ground of such fraud is not unavailable to the signer by constructive knowledge of corporation's transaction imputable to him.—International Harvester Co. of America v. Franklin County Hardware Co., Kan., 167 Pac. 1057.

21.——Signing as Maker.—If one placing his name on a note does not clearly indicate by appropriate words an intention to be bound in a special capacity, and signs as maker, his liability to holder is that of maker, although his relation to a comaker be that of surety.—State Bank of Abbyville v. Jeltz, Kan., 167 Pac. 1067.

22. **Breach of Marriage Promise**—Void Promise.—A promise of marriage by a man who is then married, contingent upon securing a divorce, is wholly void.—Smith v. McPherson, Cal., 167 Pac. 875.

23. **Burglary**—Intent.—Intoxication depriving one of reason and will power precludes a conviction of breaking and entering a building with intent to steal, where the proof shows only a breaking and entering, but not a taking away or attempt to take.—State v. Phillips, W. Va., 93 S. E. 828.

24. **Carriers of Live Stock**—Waiver.—Provision of contract for interstate shipment of live stock that no action for loss, etc., should be maintainable unless brought within six months after cause of action accrued, made in consideration of a lower shipping rate, could not be lawfully waived.—Chicago, R. I. & G. Ry. Co. v. Shroyer, Tex., 197 S. W. 773.

25. **Carriers of Passengers**—Cash Fares.—The mere fact that a railway conductor has the right to accept cash fares on a going trip from a stop which had no ticket agent did not give him the right at that time to accept fares for the return trip from a station where tickets were sold.—Southern Ry. Co. v. Pickle, Tenn., 197 S. W. 675.

26.——Contributory Negligence.—A passenger had the right to rely on a statement of a train porter that a train was taking water, and is not guilty of contributory negligence in being carried past the station, although the train was in fact at the station at the time.—Houston E. & W. T. Ry. Co. v. Thorn, Tex., 197 S. W. 778.

27.——Implied License.—In absence of regulation forbidding persons to enter trains to assist embarking passenger, one entering train for that purpose has an implied license to do so, and carrier owes him duty of ordinary care for his protection where he has notice of his purpose in entering train.—Cannon v. Atchison, T. & S. F. Ry. Co., Kan., 167 Pac. 1050.

28. **Chattel Mortgages**—Priority.—The lien of a mortgagee is superior to that of an agister, if such mortgage lien was created prior to the placing of the animal with the agister, and if the mortgagee has not waived his right of priority.—Birmingham v. Carr, Mo., 197 S. W. 711.

29. **Commerce**—Burden on.—Act March 16, 1916 (P. L. p. 235), upholding a notice by a New York manufacturer forbidding sale of his watches at less than price fixed, held valid, not placing any burden on interstate commerce, though watches were sold by a New York jobber to a dealer in New Jersey.—Robt. H. Ingersoll & Bro. v. Hahne & Co., N. J., 101 Atl. 1030.

30.——Commutation Rate.—After railroad company has established commutation rates for suburban communities, state, without violating federal Constitution, may regulate such rates, and fix rates different from those charged generally. Pennsylvania R. Co. v. Towers, U. S. S. C., 38 S. Ct. 2.

31.——Employe.—Where servant at specific orders of foreman was carrying cross-ties to repair track used by master in interstate commerce and to be used immediately on being repaired by waiting train, he was engaged in interstate commerce.—Cherry v. Atlantic Coast Line R. Co., N. C., 93 S. E. 783.

32.——Licenses.—It was not an unjust imposition on interstate commerce to require payment of a license fee by all persons distributing bills, circulars, or samples without taking orders or selling the same, since interstate commerce ends upon delivery to such persons of the circulars or samples.—Eales v. City of Barbourville, Ky., 197 S. W. 634.

33.—Tax on Privilege.—State is not debarred from imposing tax upon privilege of being corporation within it because corporation is engaged in interstate as well as intrastate

commerce.—International Paper Co. v. Commonwealth, Mass., 117 N. E. 246.

34. **Common Carriers**—Speed Ordinance.—Violation of speed ordinance of city by backing engine is negligence and not evidence of negligence.—Dunn v. Atlantic Coast Line R. Co., N. C., 93 S. E. 784.

35. **Constitutional Law**—Workmen's Compensation Act.—Workmen's Compensation Act, § 22. authorizing employers of financial ability to pay compensation direct to injured employe or dependents, does not violate the equal protection of the law clause in Const. art. 1, § 2, or Const. U. S. Amend. 14.—State v. United States Fidelity & Guaranty Co. of Baltimore, Md., Ohio, 117 N. E. 232.

36. **Corporations**—Authority of Officer.—It will not be assumed that defendant corporation's president had authority to contract to pay for unearned wages or to waive performance of the contract by plaintiff.—Wray v. Tilden Saw Co., Mich., 164 N. W. 545.

37.——Ultra Vires.—Where a construction company conveyed its plant to its surety, one who had given a mortgage to the surety to indemnify it for liability cannot object that the conveyance was ultra vires, only the company being entitled to make that objection.—Angle v. Bankers' Surety Co., U. S. C. C. A., 244 Fed. 401.

38. **Damages**—Expectancy of Life.—In action for permanent personal injury impairing earning capacity, damages for decreased earning power should be based on probable expectancy of plaintiff's life immediately before the injury.—Webb v. Omaha & S. I. Ry. Co., Neb., 164 N. W. 564.

39. **Death**—Measure of Damages.—Recovery under Federal Employers' Liability Law is limited to compensating relatives sustaining some pecuniary loss, and, while judgment may be for gross amount, each beneficiary's interest must be measured by his pecuniary loss, to be apportioned by jury on request.—Chapin v. Norfolk & W. Ry. Co., W. Va., 93 S. E. 822.

40.——Presumption of.—There is a presumption, which defendant in action for death must overcome by affirmative proof, that deceased, struck by car on track in mine, looked and failed to see car.—Pocahontas Consol. Collieries Co. v. Johnson, U. S. C. C. A., 244 Fed. 368.

41. **Divorce**—Support of Wife.—Wife, having considerable income, could not complain of decree awarding to her, for support of herself and children, practically one-half of husband's moderate salary, where he was indebted to amount exceeding value of his estate.—McKinney v. McKinney, W. Va., 93 S. E. 831.

42. **Fixtures**—Burden of Proof.—One claiming ownership of irrigating plant placed on his land by his copartner with his consent on ground that it became a part of the realty had the burden of showing that when it was placed upon his land he and owner of plant agreed that it should become part of realty.—Gracy v. Gracy, Fla., 76 So. 530.

43. **Gas**—Discontinuing Service.—Gas company discontinuing service and storing gas in service pipe, was not bound to provide against danger from concealed defect in pipe caused by one not its servant, unless it had knowledge sufficient to put it on inquiry or to raise reasonable suspicion of defect.—Canfield v. West Virginia Central Gas Co., W. Va., 93 S. E. 815.

44. **Habeas Corpus**—Release.—One convicted may not be released on habeas corpus because tried while an escaped insane patient; this not depriving the court of jurisdiction, but so trying him being, at most, error for which appeal is the remedy.—Meyers v. Halligan, U. S. C. C. A., 244 Fed. 420.

45. **Highways**—Automobile.—Under Acts 1911, p. 102, § 12, automobile driver's duty to stop when horses are frightened is not limited by what he actually sees, but is governed by what he would see in the exercise of ordinary care.—Russ v. Strickland, Ark., 197 S. W. 709.

46.——Motor Vehicles.— Gen. Code, § 12603, prohibiting the operation of motor vehicles at a speed greater than is reasonable, with regard to the traffic and general rules of the road, so as to endanger life of another, is a valid statute.—State v. Schaeffer, Ohio, 117 N. E. 220.

47. **Insane Persons**—Curator.—Conservator's only duty after ward's death is to settle accounts and pay balance to executor; but he has a right to such a settlement before he can be called upon to pay the balance to the executor.—Day v. Old Colony Trust Co., Mass., 117 N. E. 252.

48. **Insurance**—Construction of Policy.—The word, "against," in connection in which used in section 9510, General Code, providing for indemnifying of employers "against loss or damage for personal injury or death resulting from acidents to employes," means to protect and save harmless from any loss or damage whatever.—Verducci v. Casualty Co. of America, Ohio, 117 N. E. 235.

49.——Estoppel.—Where insured accepted for his application receipt stating that policy would be sent by mail and that if it was not received in 15 days to notify company, he was estopped from denying issuance of policy if he did not, within reasonable time, notify company that he had not received it.—House v. Davis, Ark., 197 S. W. 693.

50.——Public Interest.—The business of insurance is one of public interest, affecting all classes of people and property, and is therefore properly the subject of legislative regulation.—Verducci v. Casualty Co. of America, Ohio, 117 N. E. 235.

51.——Recovery.—Where railroad, whose locomotive set the fire, agreed with insurers of buildings to reimburse them to extent of 50 per cent. of loss, not including expenses or discounts, an item consisting of assessment due insurer from building owner, which was deducted on payment of loss, was not an expense or discount, but a valid debt, and payable by the railroad.—Boston & M. R. R. v. Union Mut. Fire Ins. Co., Vt. 101 Atl. 1012.

52.——Valuation.—A valued policy is one in which the valuation of a vessel is agreed upon by the parties thereto, which valuation is binding upon them as to the amount recoverable under the policy in case of loss.—Columbia Trust Co. v. Norske Lloyd Ins. Co., N. Y. 166 N. Y. S. 915.

53. **Intoxicating Liquors**—Illegal Employment.—Where a large building in one corner of which was a saloon contained a bowling alley at which boys under 16 years of age were employed as pin setters, but were not required in their duties to enter the saloon, their employment was not a violation of Burns' Ann. St. 1914, § 8022d.—Krstovich v. State, Ind., 117 N. E. 209.

54.——Illegal Sale.—One who acts as intermediary in a sale of liquor, and except for whom the sale would not have been made, is guilty of an illegal sale; but it is otherwise where one buys liquor for a third party as a matter of accommodation and not as a subterfuge, and was not interested in the sale.—Dean v. State, Ark., 197 S. W. 684.

55. **Landlord and Tenant**—Termination of Lease.—Where lease for successive periods of one year up to eight provided that lessees might terminate prior to yearly period by giving written notice, on notice of termination being given by lessees prior to yearly period, tenancy was not succeeded by another term for a year, but ended at termination of year.—Marks v. Goria Bros., Va., 93 S. E. 675.

56. **Libel and Slander**—Candidate for Office.—The official record of a candidate for re-election as district court judge and his fitness for the office may be discussed and criticized, and are libelous only where false statements have been made maliciously and not with good motives or for justifiable ends.—Estelle v. Daily News Pub. Co., Neb., 164 N. W. 558.

57. **Licenses**—Motor Vehicles.—Laws 1911, p. 94 § 13, relating to motor vehicles, and providing that nothing in the act should affect power of municipalities to regulate motor vehicles used "within their limits" for public hire, did not include vehicles carrying passengers exclusively to or from points without the municipalities.—City of Argenta v. Keath, Ark., 197 S. W. 686.

58. **Limitation of Actions**—Municipal Corporation.—Municipal corporations are not, as respects public rights, within statutes of limitations.—Trenton & Mercer County Traction Corp. v. Inhabitants of Ewing Tp., N. J., 101 Atl. 1037.

59.——New Cause of Action.—In action for death of railway employe, held, amendment of declaration to bring case within federal Employers' Liability Act did not constitute new cause of action, barring suit under limitation of two years.—Broom v. Southern Ry. in Mississippi, Miss., 76 So. 525.

60. **Mandamus**—Discretion.—Mandamus will not issue to control discretion of United States marshal in removing deputy marshal under Act Oct. 22, 1913, c. 32.—United States v. Lapp, U. S. C. C. A., 244 Fed. 377.

61. **Master and Servant**—Assumption of Risk.—An employe did not assume risk of dangers while removing tin from a lumber shelter when employer told him that place and work were safe.—Atkins v. Madry, N. C., 93 S. E. 744.

62.——Assurance of Safety.—Although where an injured employe in a quarry has, by reason of superior experience, a better knowledge or an equal knowledge of the danger of a cave-in, he cannot rely on his employer's assurance of safety, but such is not the case where the master has specially delegated one to make inspections, who assures the injured of safety.—Grey Eagle Marble Co. v. Perry, Tenn., 197 S. W. 674.

63.——Accident.—Freezing is a personal injury caused by "accident," within Workmen's Compensation Act (Gen. St. 1913, § 8230[h].)—State v. District Court of St. Louis County, Minn., 164 N. W. 585.

64.——Evidence.—Evidence held to sustain finding that freezing of workman's thumb while working as swamper, handling timber at a distance from camp, without any facilities for warmth, arose out of his employment, within Workmen's Compensation Act (Gen. St. 1913, § 8203).—State v. District Court of St. Louis County, Minn., 164 N. W. 585.

65.——Interstate Commerce.—Where flagman of railroad engaged in interstate and intrastate commerce was killed by train engaged in interstate commerce, court of common pleas of New Jersey had no jurisdiction to award compensation under New Jersey Workmen's Compensation Act; the federal Employers' Liability Act being exclusive.—Flynn v. New York, N. J., S. & W. R. Co., 101 Atl. 1034.

66.——Statutory Construction.—Mine inspector's erroneous construction of statute as not requiring light on moving cars where they struck miner, even if communicated to mine operator, held not to avail operator, actual damages only being claimed.—Pocahontas Consol. Collieries Co. v. Johnson, U. S. C. C. A. 244 Fed. 368.

67.——Workmen's Compensation Act.—Act March 27, 1913 (P. L. p. 230) § 1, supplementing Workmen's Compensation Act, providing that no employe of municipality receiving more than $1,200 per year shall be compensated under section 2 of the original act (Act April 4, 1911 [P. L. p. 134]), applies only to employes injured and not to cases of death where dependents are affected.—Jersey City v. Borst, N. J., 101 Atl. 1033

68. **Mines and Minerals**—Evidence.—Strike and slight landslide on coal railroad held insufficient to show unavoidable delay or circumstances beyond the control of defendant, so as to require instruction on forfeiture for failure to operate to refer to unavoidable delay.—Matoaka Coal Corp. v. Clinch Valley Mining Corp., Va., 93 S. E. 799.

69. **Municipal Corporations**—Motor Vehicle.—Under Gen. Code, § 12603, relating to operation of motor vehicles on public roads or highways at a speed endangering property or life, the words "motor vehicle" include automobiles, and words "public road or highway" include a public street.—Schier v. State, Ohio, 117 N. E. 229.

70.——Negligence.—The failure of an automobile driver to look both ways at a street intersection is negligence.—Ulmer v. Pistole, Miss., 76 So. 522.

71.——Pedestrian.—Pedestrian crossing street who saw and avoided truck, but in doing so stepped backward in front of street car approaching from opposite direction, and which he could have avoided had he looked, was guilty of contributory negligence.—Alexander v. American Express Co., Pa., 101 Atl. 1050.

72. **Payment**—Voluntary.—Sheriff, on showing that his deputy after paying coupon obligations of board of education pledged them for money to discharge other obligations, and that they were subsequently taken up by another deputy without notice of previous payment, could not recover amount paid the holder.—Gardner v. Nichols, W. Va., 93 S. E. 817.

73. **Principal and Surety**—Contribution.—A cosurety cannot be called upon for a contribution for the benefit of the other party if he agreed to become cosurety at the request and for the benefit of the other surety.—Lehigh Valley Trust Co. v. Strauss, Pa., 101 Atl. 1047.

74.——Subrogation.—Stock held by a third party as indemnity to bondsman on federal prisoner's bond held to continue as security, though new bonds were given from time to time in lieu of bonds, and though when last bond was executed there was no repetition of assurance that stock was held as indemnity.—United States v. Leary, U. S. S. C., 38 S. Ct. 1.

75. **Railroads**—Safety Appliance Act.—The Safety Appliance Acts are mandatory in requiring that trains must not only be equipped to run, but must actually be run without requiring brakemen to use the hand brakes in the ordinary movement of the trains.—Great Northern Ry. Co. v. United States, U. S. C. C. A., 244 Fed. 406.

76.——Setting Out Fire.—Where a fire resulted from sparks from a locomotive, there is a presumption of the railroad's negligence, and to avoid liability it must show that locomotive was constructed, equipped, and operated in reasonably safe way.—Aglionby v. Norfolk & W. Ry Co., W. Va., 93 S. E. 812.

78. **Sales**—Conditional Sale.—Where one receives machine from another under written contract which contains every element of conditional sale, but contains the words "do hereby agree to lease," and speaks of "leasee," instrument will be declared to be contract of sale and not lease.—American Can Co. v. White, Ark., 197 S. W. 695

79.——Measure of Damages.—The measure of damages for the seller's breach of a contract to supply coal is the difference between the contract price plus the freight to the place of delivery and the market value at the place of delivery.—Log Mountain Coal Co. v. White Oak Coal Co., Ky., 197 S. W. 659.

80.——Unwholesome Food.—If meat of hog sold for food was unwholesome, sale was without consideration, and seller could not refuse to refund purchase price because buyer's customers did not require him to refund.—Hixon v. Cook, Ark., 197 S. W. 698.

77. **Replevin** — Recovery. — Defendant, in action to recover possession of cow, who replevied, and gave forthcoming bond, when cow was seized in plaintiff's ancillary proceeding of claim and delivery, held liable to plaintiff for value of cow, adjudged to belong to plaintiff, she having died from natural causes before action was tried.—Randolph v. McGowans, N. C., 93 S. E. 730.

81. **Schools and School Districts**—Statutory Commission.—State school book commission, created by Code 1913, c. 45, § 155a (secs. 2216-2229), has no power after adjournment sine die to reconvene and cancel contract duly executed. —State v. Shawkey, W. Va., 93 S. E. 759.

82. **Sheriff**—Amending Return.—After final judgment in action, sheriff's return on notice of attorney's lien given at commencement of action may, on sheriff's application, be amended to make it speak truth as to service of notice.—McPherson v. Harvey, Kan., 167 Pac. 1070.

83. **Specific Performance** — Fraud. — Where compromise and settlement agreement had been fully performed by certain of the parties, so that to permit another party to sue on the original liability would be a fraud on the others, specific performance of the compromise agreement should be granted.—Boston & M. R. R. v. Union Mut. Fire Ins. Co., Vt., 101 Atl. 1012.

84. **Street Railroads** — Abutting Owner. — Township and county perpetually enjoined from removing railroad turnout on ground that its maintenance for 12 years without protest from them had estopped them, though injunction would not go against abutting owner, not threatening to remove it.—Trenton & Mercer County Traction Corp., v. Inhabitants of Ewing, Tp., N. J., 101 Atl. 1037.

85.——Municipal Corporation.—Under agreement between city and street railway, whereby railway was to pay certain sum when viaduct was made safe for heavy vehicles "or" electric cars, held, that it was liable when it was made safe for vehicles.—Cincinnati St. Ry. Co. v. City of Cincinnati, Ohio, 117 N. E. 219.

86.——Spur Tracks.—A spur track to a lot on which a street railway constructed car barns for its animals, before the advent of motor power, and for storage purposes, and the lot itself, was a necessary turnout and appurtenance under a special charter, giving it "desired turnouts and appurtenances).—City of Dayton v. South Covington & C. St. Ry. Co., Ky., 197 S. W. 670.

87. **Taxation**—Transfer Tax.—Savings bank deposits, payable to decedent or his sister, who had furnished the money, or to the suvivor, held not subject to a transfer tax as a part of decedent's estate, where there was never any purpose on his part to acquire title thereto in any event.—In re Buchanan's Estate, N. Y., 166 N. Y. S. 947.

88. **Theaters and Shows**—Ordinary Care.—If circus company anticipated ordinary storms of summer season and used ordinary care in selection and erection of tent, it was not liable to one injured when windstorm pulled up poles, but, if it did not use such care, it was liable, unless storm was so violent that care would not have changed result.—Jacobs v. Hagenbeck-Wallace Shows, Mich., 164 N. W. 548.

89. **Time**—Computation.—Under Const. art. 3, § 8, making ineligible for Legislature any city officer or one who has been such within 100 days, an officer of a city, who filed resignation in mayor's office on Monday July 30th, held ineligible as candidate for assembly at election held November 6th; the fact that July 29th was Sunday not extending the time.—In re Bewley, N. Y., 166 N. Y. S. 930.

90. **Trover and Conversion**—Right of Action. —Plaintiff, who turned over personal property to defendant in part payment of a debt, and thereafter defendant obtained and collected a judgment for the same debt, without any credit thereon, plaintiff could not sue for conversion, as ownership of property had passed to defendant.—Peltier v, Nadeau, Minn., 164 N. W. 578.

91. **Vendor and Purchaser**—Agreement.—Where agreement for sale of land covenanting for forfeiture of down deposit on purchaser's failure to perform agreement does not clearly provide that purchaser may terminate contract by his own default, such effect will not be given it.—Korman v. Trainer, Pa., 101 Atl. 1051.

92.——Description.—Description of land in contract to convey as 100 acres off west end of vendor's farm, and bounded on the north and south by the lands of R. and M., held sufficient. —Asberry v. Mitchell, Va., 93 S. E. 638.

93.——Marketable Title—Title to property described as 400 feet west of P. avenue, that being the physical line adopted by owners, was not unmarketable because the easterly line of the former avenue was 5 feet west of the line actually adopted and 405 feet west of P. avenue.—Celestial Realty Co. v. Childs, N. Y., 166 N. Y. S. 921.

94. **Waters and Water Courses**—Nuisance.—In an action for damages by sickness alleged to have been caused by mosquito bites, evidence held insufficient to go to the jury to show that a pond caused by the railroad was the proximate cause of plaintiff's illness.—Rice v. Norfolk Southern R. Co., N. C., 93 S. E. 774.

95. **Wills**—Construction.—Bequest of anything remaining from trust fund to beneficiary's daughter, should she continue to care for the beneficiary, held to refer to a continuance of such care as she was giving the beneficiary when the codicil was made.—Tibbetts v. Curtis, Me., 101 Atl. 1023.

96.——Construction.—Where testator devised realty to wife for life, with remainder to his two daughters equally, and on the death of either daughter without issue to the survivor absolutely, with remainder to testator's heirs, and wife and one daughter predeceased testator, daughter dying without issue, there was absolute devise of surviving daughter.—Platt v. Johnson, N. J., 101 Atl. 1035.

97.——Evidence.—In will contest on ground of forgery proponent should introduce his evidence as to genuineness of signatures of testator and of subscribing witness, and trial court may refuse to permit him on rebuttal to offer additional affirmative evidence on that issue.—In re O'Conner's Estate, Neb., 164 N. W. 570.

98.——Fee Simple Estate.—Under will giving land to daughters and lawful heirs of body of each in fee simple, "and if she shall die without lawful heir of her body," to other surviving heir, held that daughters took fee-simple estate subject to be defeated by death without leaving child.—Kornegay v. Cunningham, N. C., 93 S. E. 754.

99.——Mutul Wills.—Where one heir deeded the other his interests in the estate, for which the grantee orally agreed to make a will providing for the grantor, and later the parties made mutual wills, each making the other the sole beneficiary, the contract will be enforced in favor of the grantor, when the grantee subsequently altered her will to his detriment.—Lawrence v. Prosser, N. J. 101 Atl. 1040.

100. **Witness**—Credibility.—The fact that witnesses are parties to litigation affects credibility, but not competency.—Brotherhood of Railroad Trainmen v. Vickers, Va., 93 S. E. 577.